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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LAREDO JUNIOR COLLEGE, *et al.*,
Petitioners,

v.

ALEJANDRO PEREZ,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals below erred in reversing the District Court's dismissal as to Count II of Plaintiff's Complaint, and in failing to sustain the Summary Judgment as to his second claim for relief.

2. Whether Plaintiff's civil rights action, for denial of additional compensation in recognition of his Doctor of Philosophy degree, based upon the College Board of Trustees' negative employment decision denying such benefit, accrued and the statute of limitations began to run, on the date the operative decision was made and notice given to Plaintiff, thereby rendering Plaintiff's claim untimely.

3. Whether Plaintiff's civil rights claim for denial of a salary increase in recognition of his doctoral degree, predicated upon a negative employment decision, fails to give rise to a continuing violation, even though Plaintiff continued to be deprived of additional compensation and other faculty members, allegedly similarly situated, were allegedly so paid, but merely complains of the continuing painful effects of the prior employment decision.

4. Whether Plaintiff's Complaint fails to establish a continuing violation, since Plaintiff fails to identify any discriminatory acts subsequent to the challenged negative employment decision denying him a salary increase in recognition of his doctoral degree, nor to allege any identifiable ongoing discriminatory policy or system which caused the Board of Trustees' denial of his request and continues to give rise to any present violations.*

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* The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Laredo Junior College, Domingo Arechiga, President, Individually and in his Official Capacity, and the Board of Trustees of Laredo Junior College, a Body Corporate, Petitioners herein, and Alejandro Perez, Respondent herein.

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OPINION BELOW

The opinion of the Court of Appeals (Appendix pp. 1a-7a) is reported at 706 F.2d 731 (1983). The Order and opinion, with the findings of fact and conclusions of law, of the United States District Court for the Southern District of Texas, Laredo Division below (Appendix pp. 8a-10a) dated September 22, 1982, was not reported.

JURISDICTION OF THIS COURT

The opinion of the United States Court of Appeals was entered on June 10, 1983. Petitions for Rehearing filed by Petitioner and by Respondent were each denied by the Court of Appeals below by Order dated July 28, 1983, and entered July 29, 1983 (Appendix p. 11a). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the United States Constitution and the Statutes under which Respondent filed his civil rights action, 42 U.S.C. § 1981, 42 U.S.C. § 1983 and 42 U.S.C. § 1988, are set forth in Appendix, pp. 16a-17a.

STATEMENT OF THE CASE

Respondent instituted a civil rights suit pursuant to 42 U.S.C. §§ 1981, 1983 and 1988, alleging that Petitioners' denial of additional compensation in recognition of his Doctor of Philosophy Degree, was in violation of the rights guaranteed him under the First, Fifth and Fourteenth Amendments of the Constitution.

Since 1968, Respondent has been employed as a mathematics instructor at Laredo Junior College. Throughout the time in question, the college has maintained certain salarly schedule and pay policies entitling an instructor to a salary adjustment upon receiving a Doctor of Philosophy Degree, if such degree were in the instructor's teaching field. In 1978, Respondent was granted his Doctor of Philosophy Degree from the University of New Mexico in the area of "Educational Administration in Higher Education", upon completion of his dissertation entitled "The Relationship of Socio-Economic Status, Occupational Aspiration, and Ethnicity to the Anomia of High School Freshmen and Sophomores."

Upon receipt of said degree, Respondent requested additional compensation as the holder of a Doctor of Philosophy degree, pursuant to the college's salary and pay scale policies. His Department Chairperson denied his request because Respondent's doctorate was not in his teaching field of mathematics. Respondent appealed the Department of Chairperson's decision to the College Dean, and then to an Ad Hoc Committee, both of whom denied his request based upon said college policy. Respondent

next appealed the Ad Hoc Committee's decision to the College President, Dr. Domingo Arechiga, who also denied Respondent a salary increase on the grounds that Respondent's Doctor of Philosophy degree was not in his teaching field of mathematics.

Following this unbroken array of negative decisions, Respondent appealed to the college Board of Trustees. On May 2, 1978, during an executive session wherein Respondent was present, the Board of Trustees announced its decision, denying his request for a salary increase in recognition of his doctoral degree. The Board stated that it supported the President and the Ad Hoc Committee in their determination that Respondent was not entitled to additional compensation under existing college policy.

More than one year and five months after the Board of Trustees' decision, the Respondent, by his attorney, once again requested and obtained an appearance before the Board of Trustees, but this time to ask that the salary and pay scale policy be changed. The Board appointed a committee in response to his request. On December 6, 1978, Respondent and his attorney addressed the committee as to the need to change the then-existing policy, to allow exceptions to the rule that instructors had to obtain a doctorate in their teaching field to qualify for additional compensation. The committee's conclusion was that no change in the college pay policy was necessary, since the College President then already had authority, under the present existing policy, to recognize exceptions where the degree was related to the instructor's teaching field.

On August 21, 1980, more than one year and eight months after his second appearance before the Board of Trustees, Respondent, together with an American Federation of Teachers (AFT) representative, again met with Dr. Arechiga, the College President. At that time, Respondent renewed his request that the President reconsider Respondent's status and allow for payment at

the doctoral salary level. Dr. Arechiga's position, in response to his request for reconsideration, was that since the Board of Trustees had already ruled upon the matter by its May 2, 1978 decision, only the Board could make any change in his status. Thereafter, on September 10, 1980, the Respondent again requested, for the third time, that the Board of Trustees reconsider his status and to have the AFT representative address the Board on his behalf. On September 23, 1980, the Board of Trustees determined that Respondent had failed to submit any new facts or circumstances to warrant the Board's reconsideration of its earlier decision, and therefore refused to again consider his request for a salary increase.

On January 6, 1982, Respondent filed a civil rights action against Petitioners for their denial of additional compensation in recognition of his Doctor of Philosophy degree, invoking 42 U.S.C. § 1981 and § 1983. Respondent's suit was filed more than three years and eight months after the Board of Trustees rendered its May 2, 1979 decision, rejecting his request for a salary increase, this to Respondent. Under the applicable statute of limitations, Tex. Rev. Civ. Stat. Ann. art. 5526 (Vernon Supp., 1982), Respondents' federal civil rights claims were required to be filed within a two-year limitations period.

EXISTENCE OF JURISDICTION BELOW

The District Court for the Southern District of Texas had jurisdiction over Respondent's federal civil rights claims under 28 U.S.C. § 1331 and § 1343.

In his Complaint, Respondent alleged five claims for relief, first, asserting that the Petitioners' denial of additional compensation was arbitrary and in violation of his right to due process of law. Respondent's second claim alleged that his continued failure to receive additional compensation, for recognition of his doctoral degree con-

stituted a continuing violation for denial of equal treatment in pay on the grounds that "other faculty members of Laredo Junior College, similarly situated, have been compensated for doctoral degrees outside their assigned teaching area", while he continued to be denied such benefit.

Respondent's third federal civil rights claim alleged that the Petitioners' denial of his request for a salary increase upon receiving his doctorate was in retaliation for his exercise of his First Amendment rights. His fourth and fifth claims alleged that the Petitioners' denial of additional compensation was a breach of contract, and in violation of ex post facto provisions of the state and federal constitutions, brought under state law, and within the District Court's pendent jurisdiction.

Following the institution of suit, Petitioners filed their Answer specifically denying Respondent's allegations and asserting the applicable two-year statute of limitations as an affirmative defense. Respondents served Interrogatories upon Petitioners, and Answers were filed on behalf of the college, and on behalf of Dr. Arechiga, Individually, to which no objections were raised. Petitioners thereafter moved for Summary Judgment, under Rule 56 of the Federal Rules of Civil Procedure, filing supporting briefs to the court, together with the supporting affidavit of Dr. Arechiga asserting that Respondent's claims were barred by the Statute of Limitations as a matter of law.

As grounds for summary judgment, Petitioners relied principally upon this Court's decision in *Delaware State College vs. Ricks*, 449 U.S. 250 (1980), and asserted that Respondent's civil rights claims for denial of a salary increase in recognition of his doctoral degree, accrued for limitation purposes at the time the Board of Trustees rendered its negative employment decision, denying such benefit and communicated this to Respondent. Petitioners further asserted that Respondent failed to allege a con-

tinuing violation, in that his Complaint for denial of a salary increase was based upon a single wrongful act, and did not allege any discriminatory acts subsequent to the Board's decision so as to constitute a continuing violation, despite Respondent's continued employment at a nondoctoral salary level and his repeated requests for reconsideration of that negative decision.

In his opposition to Summary Judgment, Respondent argued that his Complaint alleged failure to promote; denial of pay; and disparate compensation claims which were therefore inherently continuing. Respondent argued that his claims were analogous to such cases brought under Title VII, such that present violations occurred on each occasion Respondent was paid a nondoctoral salary, and that this Court's decision in *Delaware State College vs. Ricks*, was therefore inapplicable. Respondent failed to file any controverting affidavits, asserting that his allegations of a continuing violation in his Complaint were sufficient to defeat Petitioner's Summary Judgment motion.

Thereafter, the United States Magistrate, Eduardo E. de Ases, filed his Memorandum and Recommendation, to the District Court, with proposed findings of fact and conclusions of law, and recommended that Summary Judgment be denied on the grounds that Respondent had alleged a continuing violation and thus his suit was timely filed. The Magistrate found that Petitioners had rejected Respondent's claim for additional compensation and so informed Respondent on May 2, 1978, when the Board of Trustees announced its decision, denying such benefit, in Respondent's presence, and this fact remains undisputed. The Magistrate concluded that Respondent alleged a "failure to promote" claim, citing the Title VII cases relied upon by Respondent, which was therefore continuing, and that a factual question existed as to whether the alleged discriminatory acts of Petitioners were continuing. Petitioners filed Objections to the Magistrate's Memo-

randum and Recommendation, asserting that, under this Court's decisions in *Delaware State College vs. Ricks*, 449 U.S. 250, and *United Air Lines vs. Evans*, 431 U.S. 553 (1977), Respondent's complaint was based upon a single allegedly wrongful act, namely the Board of Trustees' denial of a salary increase; and that Respondent failed to allege a continuing violation, but merely complained of the ongoing negative effects of the past isolated application of the college pay scale policies to his particular circumstances. Respondent filed his response thereto.

On September 22, 1982, the District Judge entered an Order Rejecting the Magistrate's Memorandum and Recommendation and Granting Petitioner's Motion for Summary Judgment (App. pp. 8a-10a). The District Court held that Respondent's Complaint alleged only a single violation for failure to increase his compensation in recognition of his Doctor of Philosophy degree, which accrued for limitations purposes on the date Respondent was informed of the Board of Trustees negative employment decision, denying his request for additional compensation, and was therefore barred by the applicable two-year statute of limitations as a matter of law. The court held that Respondent failed to allege a continuing violation and that the title VII cases relied upon by Respondent were inapplicable to this case.

Subsequent to that Order, Respondent moved to vacate and deny summary judgment, and on October 25, 1982, the District Judge denied such motion. The Order was entered on October 26, 1982, and on the same date, Judgment was entered dismissing all of Respondent's Federal Civil Rights claims as barred by the Statute of Limitations and dismissing his remaining state claims for lack of pendent jurisdiction (App. pp. 8a-10a). Respondent then filed notice of appeal.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed in part and reversed in part and

remanded (App. pp. 1a-7a, 11a). The Court held that as to all of Respondent's claims, except for Count II of his Complaint, the statutory limitations period began to run when additional compensation was first denied, and the Court sustained the summary judgment dismissing these claims as untimely. With respect to the first, third, fourth and fifth counts of Respondent's Complaint, the court held that all of these claims alleged a single violation based upon one event, namely, the Board of Trustees' decision to deny Respondent a salary increase in recognition of his doctoral degree (App. pp. 2a, 5a-7a). The Court held that these claims accrued at the time that the alleged wrongful act occurred, and did not constitute a continuing violation because, "even though the damages resulting from that act, loss of pay, may continue, the wrongful act itself, the denial of the claim for pay, did not." (App. p. 5a).

However, as to Respondent's second claim for relief, the Court of Appeals departed from its earlier position, and reversed the District Court's dismissal, on the grounds that such claim alleged a continuing denial of each protection (App. pp. 1a-2a). The court held that Respondent's allegation in his Complaint that "other faculty members of Laredo Junior College, similarly situated, have been compensated for doctoral degrees outside their teaching areas", while he has been denied such additional compensation, and that "the disparate treatment of [Respondent] in compensation [has] deprived and continue[s] to deprive [Respondent] of rights to equal treatment under the laws to which he is entitled" alleged a continuing denial of equal treatment which invoked the Fourteenth Amendment guarantee of equal protection (App. p. 6a). The Court of Appeals held that the record does not compel the conclusion that, if there was a denial of equal protection, it ceased more than two years ago, since there was no mention as to whether other faculty members, allegedly similarly situated, have been paid so within the statutory period or are still being paid. (App. p. 2a).

Upon its reversal of the dismissal of Respondent's second claim, the Court of Appeals therefore remanded for further proceedings with regard to the count, holding that "[if] the college has, since denying Perez additional pay, paid such compensation to another faculty member who, like Perez, has a doctorate outside his teaching field, then the statute does not bar his claim." (App. p. 7a).

Thereafter, Respondent and Petitioner filed their Petitions for rehearing, both of which were denied by the Court of Appeals on July 28, 1983. The order denying rehearing was filed on July 29, 1983. (App. p. 11a), after which Judgment was entered (App. p. 11a).

REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that this decision should be reviewed because it directly conflicts with this Court's decision in *Delaware State Colege vs. Ricks*, 449 U.S. 250, as to the timeliness of a civil rights claim for the denial of a benefit based upon a negative employment decision, and erroneously applies the continuing violations doctrine, contrary to this Court's decision in that case. We submit that the rule anounced in the case expands the availability of the continuing violations doctrine to "continuing effects" of a negative employment decision so as to dispose of the statute of limitations as a defense for employers in any civil rights claim involving a negative employment decision. In either event, this Court should grant review.

ARGUMENT

I. The Court of Appeals' Decision Below directly conflicts with this Court's conclusion in *Delaware State College vs. Ricks*, 449 U.S. 250, that Plaintiff's civil rights claim for denial of a benefit accrues, for statutory limitations purposes, on the date the negative employment decision, denying such benefit, is rendered and communicated to Plaintiff, not when its consequences become painful.

In *Delaware State College vs. Ricks*, this Court spoke upon the question as to the timeliness of a civil rights action involving the denial of tenure as the result of a negative employment decision. The Court, in deciding that case, set forth the analysis to be used when determining whether a civil rights complaint has been timely filed, holding that courts are first required to identify precisely "the unlawful employment practice" of which Plaintiff complains, and then to identify that point in time when the alleged wrongful act occurred. 449 U.S. at 257-258. The Court concluded that, based upon this inquiry, a Plaintiff's civil rights claim accrues, and the limitation period begins to run, on the date of the alleged discriminatory act, not when the consequences of the operative act become painful. 449 U.S. at 258.

Guided by these principles, the Court proceeded to hold, in the *Ricks* case, that the Plaintiff's complaint for denial of tenure alleged a single discriminatory act, namely, the denial of his request for tenure, which occurred on the date the Delaware State College Board of Trustees rendered its decision denying Plaintiff tenure, and communicated this to Plaintiff. This Court then determined that Plaintiff's cause of action accrued, and the statute of limitations commenced to run, as of that date, even though the effects of the denial of tenure, namely the actual termination of his employment, occurred one year later. *Ricks* 449 U.S. at 257.

In *Ricks*, the Court further concluded that the loss of Plaintiff's teaching position, upon the expiration of his one-year terminal contract, was merely a delayed, yet inevitable consequence of the prior negative employment decision, and did not comprise a subsequent discriminatory act to extend the commencement of the limitations period beyond that time. 449 U.S. at 258; *Chardon vs. Fernandez*, 454 U.S. 6 (1981); *United Air Lines vs. Evans*, 431 U.S. 553 (1977).

Petitioners submit that out of this Court's decision in *Ricks* emerged the rule that where a Plaintiff's civil rights claim arises from a negative employment decision for denial of a benefit, the controlling factor which triggers the statute of limitations is the date when the operative decision is made and notification given to Plaintiff, not when the consequences of that decision are felt. *Ricks*, 449 U.S. at 258; *Chardon vs. Fernandez*, 454 U.S. at 8; *United Airlines vs. Evans*, 431 U.S. at 558. Petitioners assert that the conclusion of this Court in the *Ricks* case bears directly upon the problem here involved, and the fact that *Ricks* involved the denial of tenure, whereas this case deals with the denial of recognition of Respondent's Doctor of Philosophy degree as a basis for additional compensation is of no meaningful significance, since in both cases, the Plaintiff's civil rights claim is predicated upon the denial of some benefit as the result of an unfavorable employment decision.

Petitioners therefore assert that the Respondent's civil rights claim in this case alleges only a single wrongful act, namely, the rejection of Respondent's request for a salary adjustment in recognition of Respondent's doctoral degree, which occurred on May 2, 1978, at the date when the Laredo Junior College Board of Trustees rendered its negative employment decision denying such request and communicated this to Respondent. As this Court decided in *Ricks*, the statute of limitations as to Respondent's cause of action, commenced to run at this time, even though the effects of the Board's decision for denial of a

salary increase, Respondent's failure to be paid a doctoral salary, will continue to be felt. *Ricks*, 449 U.S. at 257-258.

The Court of Appeals, in its decision below, has flatly rejected the date the operative decision was made, and notice given to Respondent, as the basis for determining the timeliness of the Respondent's Section 1981 civil rights action now before this Court. Instead, that Court has held that Count II of Respondent's Complaint alleges a denial of pay claim which continues long after that date, for so long as Respondent continues to be paid at a nondoctoral salary level. (App. p. 6a.)

As the basis for its decision the Court of Appeals has today taken the position that the continued failure to afford Respondent a salary adjustment for recognition of his doctoral degree arising from the Board's decision denying such request, gave rise to subsequent discriminatory acts so as to extend the commencement of the limitations period beyond that date. The Court of Appeals below has therefore allowed the continuing effects of the past negative employment decision to prolong the life of Respondent's cause of action indefinitely. The law of this Court clearly does not allow such a result.

Rather, as discussed hereto, Respondent's continued employment at a nondoctoral salary level was merely a painful but unavoidable consequence of the Board of Trustee's prior negative decision, no different from the delayed termination of the Plaintiff in *Ricks*, and Respondent failed to allege any discriminatory acts after that time which would extend the limitations period. 449 U.S. at 558; *United Airlines vs. Evans*, 431 U.S. at 558. Petitioners submit that under the law of this Court in *Ricks*, the statute of limitations, as to Respondent's cause of action, was triggered on May 2, 1978, when the operative decision was made, denying Respondent's request for additional compensation in recognition of his doctoral degree, and communicated to Respondent.

As the District Court below correctly held, no factual dispute exists as to that date, and therefore the Respondent's civil rights claim is barred by the applicable two-year statute of limitations as a matter of law. We believe that this Court should review this case in that it is important that the principles set forth by this Court in *Delaware State College vs. Ricks*, be affirmed in this case to correct the clearly erroneous decision of the Court of Appeals below as to the reversal of dismissal by the District Court of Respondent's Section 1981 civil rights claim and to aid in the proper resolution of future civil rights claims involving the denial of a benefit as the result of a negative employment decision.

II. The Court of Appeals' Decision below is in direct conflict with this Court's decision in *Delaware State College vs. Ricks*, 449, U.S. 250 and *United Airlines vs. Evans*, 431 U.S. 553 which rejects mere continuity of employment or the effects of a prior illegal act as giving rise to a continuing violation.

The basis of the Court of Appeals' reversal of the District Court's dismissal as to Count II here, and its decision that Respondent's second claim states a continuing violation, rests upon the Respondent's allegations that he has been denied equal treatment in compensation in that he was denied a salary increase and continues to be deprived of additional compensation in recognition of his doctoral degree, whereas other faculty members, allegedly similarly situated, have been, and continue to be so paid (App. p. 6a). However, such reasoning that the continued denial of such benefit asserts a continuing violation, not only conflicts with this court's decision in *Ricks* as to the timeliness of a civil rights claim predicated upon a negative employment decision, discussed *Supra*, pp. 9-13, but is also at variance with the Court's conclusions in that case as to the permissible basis for applying the continuing violations doctrine.

In *Delaware State College vs. Ricks*, this Court held, as discussed *Supra* pp. 11-13, that mere continuity of

employment or the ongoing negative effects of a prior employment decision will not, in and of themselves, give rise to a continuing violation absent any present discriminatory acts. In that case, the court rejected Plaintiff's attempts to invoke a continuing violation theory to extend the commencement of the limitations period from the date his tenure was denied, until his actual termination of employment, holding that the subsequent loss of his teaching position was merely a delayed but inevitable consequence of the denial of tenure, and failed to allege a continuing violation. 449 U.S. at 257, *United Airlines vs. Evans*, 431 U.S. at 558.

Today, the Court of Appeals would hold that Respondents' continued employment at a nondoctoral salary level, and the fact that he continues to be deprived of additional compensation in recognition of his doctorate, asserts a continuing denial of his constitutional right to equal treatment in pay. However, as demonstrated earlier, rather than asserting a continuing violation, Respondent's allegations, that he continues to be deprived of additional compensation in recognition of his doctoral degree, merely complain of the ongoing effects of the past negative employment decision. In the same manner, Respondent's continued employment at a nondoctoral salary level is an inevitable consequence of the denial of a salary increase, an act which was completed at the time the Board of Trustees made its decision and communicated this to Respondent. *Ricks*, 449 U.S. at 258, *Chardon vs. Fernandez*, 454 U.S. at 6.

In *Ricks*, this Court reaffirmed its decision in *United Airlines vs. Evans*, 431 U.S. 553, where the court held that a prior discriminatory act based upon the isolated application of an employment policy or system, which is itself neutral and makes no impermissible distinctions, is of no present legal consequence where not made the basis of a timely charge, even if the past application of that neutral policy may have been the basis for a valid civil rights claim against the employer. *Evans*, 431 U.S.

at 558. By its decisions in *Ricks* and *Evans*, this Court has sharply restricted the continuing violations doctrine.

Petitioners therefore submit that rather than asserting a continuing violation, this case presents a perfect example of a situation where the continuing violations doctrine should not be applied at all. Despite the Court of Appeals' emphasis upon a continuing denial of equal protection alleged by Respondent, in this case there is no contention that the college pay scale policy was anything but neutral. Respondent fails to allege any facts which would even suggest that the Board of Trustees' decision, denying him a salary adjustment in recognition of his doctoral degree, was predicated upon any discriminatory policy or system used by the college in making its employment decisions.

Rather, the Court of Appeals seems to believe that the ongoing and continuing effects, of an isolated application of a neutral college policy in an alleged discriminatory manner, as to Respondent's particular circumstances is an appropriate and permissible basis for applying the continuing violations doctrine. However, this Court has held otherwise. The Court of Appeals' decision is in error, and its reversal of dismissal must be overturned, in that even if the denial of additional compensation to Respondent was done discriminatorily, such decision is of no present legal consequence since it was not made the basis of a timely charge. *Ricks*, 449 U.S. at 258; *Evans*, 431 U.S. at 558.

III. This Case Presents a Matter of Substantial Public Importance and Concern and the Court of Appeals, by its Decision below, has misapprehended the Nature and Purpose of the Continuing Violations Doctrine Contrary to Applicable Decisions of this Court.

It hardly needs repeating at this time that, by its recent decisions in *Delaware State College vs. Ricks*, 449 U.S. 250 and *Chardon vs. Fernandez*, 454 U.S. 6, together with its decision in *United States vs. Evans*, 431 U.S.

553, this Court has firmly established that in order to assert a continuing violation, claimants are required to identify some present discriminatory act, or the existence of some ongoing illegal practice, giving rise to present violations within the limitations period.

To the contrary, the Court of Appeals, in its decision of reversal of dismissal as to Respondent's second claim for relief, has sanctioned the application of the continuing violations doctrine solely based upon Respondent's allegations that he continues to be deprived of the benefit of additional compensation in recognition of his doctoral degree, and that other faculty members, allegedly similarly situated, have allegedly been so paid (App. p. 6a). The Court of Appeals has decided that Respondent's claim for denial of equal treatment in pay alleges a continuing violation of his equal protection rights for so long as he continues to be denied a salary increase in recognition of his Doctor of Philosophy degree (App. pp. 6a-7a, n. 12).

Petitioners submit that herein lies the fundamental error of the Court of Appeals' decision, in that Respondent has failed to allege any present discriminatory acts, subsequent to the Board of Trustees' decision, so as to give rise to any present violations. Respondent has also failed to identify any discriminatory policy or system, maintained by the college, which gave rise to the negative employment decision, nor to allege even minimal facts indicating that any such discriminatory policy or system continues to be enforced by the college to cause any present violations. Therefore, Respondent's attempt to avoid the statute of limitations, and the Court of Appeals' decision, condoning the application of the continuing violations doctrine here, is directly in conflict with the applicable decisions of this Court.

The Court of Appeals, in addition to relying upon the conclusory allegations of Respondent's Complaint as a

basis for its decision, also seems to adopt the analogy drawn by Respondent between this case and lower court cases involving civil rights claims for disparate compensation, where the continuing violations doctrine was applied to give rise to a separate cause of action for wage discrimination for each day the Plaintiff is paid pursuant to an allegedly discriminatory policy or system. (App. p. 6a). The Court of Appeals apparently agrees that Respondent's claim for denial of pay is analogous to those cases, and therefore inherently continuing, giving rise to a separate violation for each day that Respondent is paid at a nondoctoral salary level.

However, we submit that this analogy is not apt, since in all of the cases cited in reliance thereof, the application of the continuing violation doctrine is clearly predicated upon a challenge to some established ongoing discriminatory policy or system, which is certainly not the case here.

Although, the Court does not expressly state any specific grounds for applying the continuing violations doctrine, the court seems to feel that this case states a continuing violation under the "series of separate acts" theory, whereby an alleged violation "does not occur at a single moment, but in a series of separate acts, and if the same alleged violation was committed at the time of each act, that the limitation period begins anew with each violation and only those violations preceded by the filing of the complaint are foreclosed." (App. pp. 4a-5a). In this respect, the court suggests by dicta in a footnote, that "[here], the alleged illegal act is denying [Respondent] pay on the basis contrary to that which other faculty members are paid. . ." (App. pp. 6a-7a, n. 12).

Yet, as this Court decided in *Ricks*, even if Respondent was denied a salary increase on the basis contrary to that which other faculty members were paid, the denial of a salary adjustment as to Respondent and the denial of recognition of his doctoral degree, occurred on the date

the Board of Trustees rendered this negative employment decision denying such benefit, and communicated this to Respondent. The fact that Respondent thereafter continued to be deprived of additional compensation, and the allegation that other faculty members may have been so paid, are merely the effects and inevitable consequence of the prior negative employment decisions, and do not comprise a sufficient basis for invoking the continuing violations doctrine.

Petitioners submit that the reasoning adopted by the Court of Appeals in its decision below, not only conflicts with applicable decisions of this Court, but also misapprehends the nature and purpose of the continuing violations doctrine as interpreted by this Court. The Court of Appeals, by reversing the dismissal of the District Court as to Count II of Respondent's Complaint, overlooks and attempts to circumvent the requirement that Plaintiffs identify some present violations, as a basis for asserting a continuing claim. However, absent the existence of present violations, the justification for extending the time for commencement of the statute of limitations period, and cutting off the employer's affirmative defense, is undermined.

We do not believe it necessary to outline in this petition the history and purpose of the judicially-created continuing violations theory or its treatment by this court. It is sufficient to say that the doctrine could not have been intended to merely provide a tool by which Plaintiff's could avoid the statute of limitations on their failure to bring a timely claim, especially where the alleged illegal act can be identified as having occurred at an easily ascertainable point in time.

Rather, we believe the doctrine should properly be restricted to cases where a challenge to an established ongoing discriminatory policy has been brought. In such situations, the continuing violations doctrine serves to aid claimants in obtaining relief where the particular

dates or times of the illegal acts complained of cannot be identified or are not easily obtainable, and to avoid sole reliance on long-past events about which proof may be difficult to obtain. *See*: *Sullivan, Zimmer and Richards, Federal Statutory Law of Employment Discrimination* (1980), Section 3.5, pp. 276-283.

Although the continuing violations doctrine is currently the subject of much confusion and newly emerging concerns, this Court has already established coherent guidelines for determining the timeliness and continuing nature of a civil rights claim such as that present here. Petitioners believe that the Court of Appeals, in struggling with developing theories to somehow bring this case within the continuing violations doctrine, have failed to recognize what is both obvious and settled.

IV. The Court of Appeals has sanctioned an expansion of the continuing violations doctrine, and so far encroached upon the statute of limitations, as to call for an exercise of this court's power of supervision.

The questions presented by this case are of great and recurring significance in the administration of civil rights actions and employment discrimination suits pursuant to Section 1981 and elsewhere. The reasoning adopted by the Court of Appeals in this case assures that the continuing effects of any negative decision will give rise to a continuing violation, and effectively disposes of the statute of limitations as a defense for employers wherever an employment discrimination action is based upon a negative employment decision.

The effect of the decision of the Court of Appeals below, if unreversed, is that in any such situation, the "continuing effects" argument will always be available to Plaintiffs, and all challenged decisions will always comprise a continuing violation, because the inevitable consequences of any negative employment decision is the continued denial of some benefit to the Plaintiff, while

others, similarly situated, continue to receive such benefit up to the limitations period, and for so long thereafter as the neutral policy or system, which gave rise to the operative decision, continues to be maintained by the Defendant employer. In denial of tenure cases, Plaintiff will continue to be denied tenure, while other employees will continue to be granted tenured positions. In discharge of employee cases, the fired employee will continue to be fired, while others hired, subsequent to Plaintiff's discharge, will continue to be employed.

However, in these situations, the alleged continuing violation will not be premised upon any discriminatory policy or procedures, nor upon a series of any separate discriminatory acts, but merely upon the continuing effects of a particular negative employment decision, resulting from a past isolated application of a neutral policy or system which continues to be maintained by the Defendant employer.

The important nature of these issues, and the restricted application of the continued violations doctrine as to the negative effects of a prior employment decision, has already been recognized by this Court as recently as in *Delaware State College vs. Ricks*, *supra*, and *Chardon vs. Fernandez*. Moreover, to hold that a Plaintiff has a continuing claim, merely because others continued to receive a benefit—whether a doctoral salary, as in this case, or a tenured position, as in *Ricks* or *Chardon*—operates to deprive employers of any access to the statute of limitations defense, indefinitely, for so long as Defendants continue to maintain the neutral policy or system which gave effect to the challenged employment decision because presumably, throughout that time, there will continue to be recipients of the same benefit which was denied to Plaintiff.

As this Court noted in the case of *Delaware State College vs. Ricks*:

It Should not be forgotten that time-limitations provisions themselves promoted important interests; "the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones". Johnson v. Railway Express Agency, Inc., supra, at 463-464, 95 S.Ct. at 1721-1722. See Mohasco Corp. v. Silver, —— U.S. ——, ——, ——, 100 S.Ct. 2486, at 2494, 65 L. Ed. 2d 532 (1980). 449 U.S. at 259.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 82-2464
Summary Calendar

ALEJANDRO PEREZ,
Plaintiff-Appellant,

v.

LAREDO JUNIOR COLLEGE, *et al.*,
Defendants-Appellees.

June 10, 1983

Appeal from the United States District Court
for the Southern District of Texas

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Invoking 42 U.S.C. §§ 1981 (1976) and *id.* § 1983 (Supp. III 1979), a member of the faculty of a state college contends that he was denied additional compensation due him after he received a Doctor of Philosophy degree. The district court dismissed the action because the plaintiff failed to file his claim within two years of the time additional compensation was first denied him, and, therefore, the Texas statute of limitations barred his claims. The sole issue is whether any of the claims asserted were continuing violations of the plaintiff's federal rights and are, therefore, not barred. Finding that, as to all claims but that of a continuing denial of equal protection of the law, the statutory limitations period began to run when additional pay was first denied, we sustain the summary judgment dismissing those claims

for their belated filing. However, the record does not compel the conclusion that, if there was a denial of equal protection, it ceased more than two years ago, and we, therefore, reverse the judgment dismissing that claim and remand for further proceedings with regard to it.

Dr. Alejandro Perez is a member of the faculty of Laredo Junior College, a Texas state institution. He received a master's degree in mathematics from the University of Utah in 1968. He has been a member of the Laredo Junior College faculty since 1968, teaching mathematics. In 1975, Dr. Perez made known to college officials his plans to work on a Doctor of Philosophy degree in Educational Administration in Higher Education at the University of New Mexico. While pursuing the doctorate degree, he was paid additional compensation for courses he was taking despite the college's written regulations calling for such additional pay only when courses are taken "in the teaching subject."

In 1977 Dr. Perez received his Ph.D. degree. In 1978, he sought additional compensation pursuant to Laredo's policy of granting a salary increase when a faculty member received a doctorate. His department head denied the increase because such compensation was due under the college's pay policies only if the doctoral degree was in the instructor's teaching field, and Perez was teaching mathematics, not educational administration. Perez appealed the decision to the college dean, then to an ad hoc committee; each denied his request. On March 9, 1978, he appealed the ad hoc committee's decision to the college president who, on March 31, denied the increase. He next appealed to the Board of Trustees, which denied the appeal on May 2, 1978. Perez continued, however, to teach at the college. He commenced this action in January, 1982, more than three years and eight months after the Board of Trustees finally denied his appeal.

Congress has set no statute of limitations on suits arising under § 1983, so we borrow the applicable state

statute.[1] The limitations period guarantees the protection of the civil rights laws to those who promptly assert their rights, yet protects employers from the burden of defending claims arising from employment decisions that are long past. *Delaware State College v. Ricks*, 449 U.S. 250, 256-57, 101 S.Ct. 498, 503, 66 L.Ed.2d 431, 439 (1980).

Although state law governs the substantive limitation period, federal law determines when a civil rights action accrues and, therefore, when the statute of limitations begins to run.[2] In deciding when the statute of limitations commences to run under §§ 1981 and 1983, we look to the Title VII cases. *See* 42 U.S.C. §§ 2000e to 2000e-17 (1976 & Supp. III 1979). The determination "requires us to identify precisely"[3] when the deprivation forbidden by § 1983 or the denial of equal benefit of the laws forbidden by § 1981 occurred.[4] We assume that the

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[1] *Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 95 S.Ct. 1716, 1721, 44 L.Ed.2d 295, 303 (1975); *Green v. Forney Engineering Co.*, 589 F.2d 243, 245 n. 3 (5th Cir. 1979). The applicable Texas statute is a two-year limitations period, Tex.Civ.Stat.Ann. art. 5526 (Vernon Supp. 1982), both as to claims under § 1981 and § 1983. *Drayden v. Needville Independent School Dist.*, 642 F.2d 129, 132 (5th Cir. 1981); *Green*, 589 F.2d at 247.

[2] *Drayden*, 642 F.2d at 131; *Rubin v. O'Koren*, 621 F.2d 114, 116 (5th Cir. 1980), *on rehearing*, 644 F.2d 1023 (5th Cir. 1981).

[3] *Ricks*, 449 U.S. at 257, 101 S.Ct. at 503, 66 L.Ed.2d at 439.

[4] Section 1981 provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Because we consider solely the issue raised, whether the statute of limitations has run, we intimate no opinion on the question whether Perez's claims are cognizable under § 1981. Neither do we

continuing violation theory is available to remedy employment practices and policies that operate to deny employees their protected rights if the offending practice continued to be enforced during the limitations period.[5] To establish a continuing violation, however, the plaintiff must establish that the unconstitutional or illegal act was a part of "standard operating procedure," a fixed and continuing practice.[6]

If the discrimination alleged is a single act, the statute begins to run at the time of the act.[7] If, on the other hand, the statutory violation does not occur at a single moment but in a series of separate acts and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation and only those violations preceding the filing of the complaint by the full limitations period are foreclosed.[8] Similarly, if the statutory violation occurs as a result of a continuing policy, itself illegal, then the statute does not foreclose an action aimed at the company's enforce-

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intimate any opinion concerning whether the fact that he was paid additional compensation while working on his doctorate created such an expectation as to give him a cause of action under § 1983.

[5] *See, e.g., Jewett v. International Telephone & Telegraph Corp.*, 653 F.2d 89 (3d Cir.) (and cases cited therein), *cert. denied*, 454 U.S. 969, 102 S.Ct. 515, 70 L.Ed.2d 386 (1981).

[6] 653 F.2d at 92.

[7] *See Ricks*, 449 U.S. at 258, 101 S.Ct. at 504, 66 L.Ed.2d at 439.

[8] *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980) (per curiam) (discriminatory violation—unequal pay—occurred in series of separate but related acts throughout employment); *Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977) (failure to promote and raise pay stated cause of action under continuing violation theory), *cert. denied*, 434 U.S. 1069, 98 S.Ct. 1251, 55 L.Ed.2d 772 (1978); *see Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981) (plaintiff's repeated efforts to be hired and company's repeated refusal to hire stated cause of action under continuing violation theory).

ment of the policy within the limitations period.[9] Thus in *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1981), dealing with whether a charge of discrimination in violation of Title VII was filed within the 180-day statutory period we distinguished between "a discrete act of discrimination [that occurred] more than 180 days prior to the filing of [the] charge" and the act of "continuously maintaining an illegal employment practice." *See also Allen v. United States Steel Corp.*, 665 F.2d 689 (5th Cir. 1982); *Dobbs v. City of Atlanta*, 606 F.2d 557 (5th Cir. 1979).

Perez's complaint has five counts. In accordance with the instructions in *Ricks* that we "identify precisely" the nature of the complaint and when the reprobated act occurred, we examine each. Of course the mere allegation that the wrong is continuing, made several times in the complaint, is conclusory and must be evaluated in the light of the facts stated in the complaint and those adduced in support of, or against, the motion for summary judgment.

The first claim is that the denial of additional pay was arbitrary and in violation of Perez's right to due process of law and was a malicious act. This in effect alleges a single violation, the Board of Trustees' decision to deny Perez a raise. Even though the damages resulting from the act, loss of pay, may continue, the wrongful act itself, the denial of the claim for pay, did not. By simple analogy, the event was like a tort that injures a person causing him to lose income for months or years thereafter. The cause of action accrues when the tort is committed.[10]

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[9] *E.g., Roberts*, 650 F.2d at 826-28 (and cases cited therein); *Downey v. Southern Natural Gas Co.*, 649 F.2d 302, 304 (5th Cir. 1981).

[10] *See United Airlines v. Evans*, 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed. 571 (1977).

The second claim requires more extended discussion, and we, therefore, consider it below. The third claim is that additional pay was denied Perez in retaliation for his exercise of first amendment rights. This likewise states but a single wrongful act. The fourth claim is for breach of contract; assuming without deciding that this claim could constitute a violation of § 1981 or § 1983, there was but one event. The fifth claim is that the denial was a violation of the ex post facto provisions of the federal and state constitutions. This, too, is based on one event.

We turn now to the second claim. Perez's complaint alleges that "other faculty members of Laredo Junior College, similarly situated, *have been* compensated for doctoral degrees outside their teaching areas." (emphasis added). This is alleged to be a continuing denial of equal treatment and presumably invokes the fourteenth amendment guarantee of equal protection of the laws. Perez argues that each day he is not paid on the same basis as another faculty member is a separate violation of his constitutional rights. The college denied that allegation but did not negate it by deposition or affidavit. More important, the evidentiary materials offered in support of and against the summary judgment motion do not mention whether other faculty members, allegedly similarly situated, have been so paid within the statutory period or are still being paid. The burden of proving that there is no genuine dispute of material fact is on the party who seeks summary judgment.[11] A constitutional claim should not be dismissed on the basis of the construction of the verb-tense in a pleading.[12]

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[11] *See, e.g., Nicholas Acoustics & Specialty Co. v. H & M Construction Co.*, 695 F.2d 839, 844 (5th Cir. 1983).

[12] *Cf. Chardon v. Fernandez*, 454 U.S. 6, 102 S.Ct. 28, 70 L.Ed.2d 6 (1981) (per curiam) (tenure denial case). The Supreme Court said, "There were no other allegations, either in *Ricks* or in these cases, of illegal acts subsequent to the dates on which the decisions

If the college has, since denying Perez additional pay, paid such compensation to another faculty member who, like Perez, has a doctorate degree outside his teaching field, then the statute does not bar his claim.[13] If, however, any such practice ceased more than two years ago,[14] Perez would be asserting neither a continuing violation manifested by a number of incidents[15] nor a continuing unlawful policy or practice.[16]

For these reasons, we AFFIRM the judgment dismissing all counts of the complaint except Count II. As to that count, we REVERSE the dismissal and REMAND for further proceedings consistent with this opinion. If the second federal claim is not barred by the statute of limitations, the district court should reconsider its dismissal of the pendent state law claim.

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to terminate were made." *Id.* at 8, 102 S.Ct. at 29, 70 L.Ed.2d at 9. Here the alleged illegal act is denying Perez pay on the basis contrary to that on which other faculty members were paid, not the fact of continuing to pay the other faculty members.

[13] *See, e.g., Collins v. Manufacturers Hanover Trust Co.*, 542 F.Supp. 663, 670 (S.D.N.Y. 1982).

[14] If so, there was an ascertainable date on which the alleged act of discrimination occurred, and that is the day the statute began to run. *See generally Milton v. Weinberger*, 645 F.2d 1070, 1075 (D.C. Cir. 1981); *Collins*, 542 F.Supp. at 670.

[15] *See Collins*, 542 F.Supp. at 670.

[16] *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 381, 102 S.Ct. 1114, 1125, 71 L.Ed.2d 214, 231 (1982) (plaintiff challenged "not just one incident of conduct" but unlawful practice continuing into the limitations period).

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

C.A. No. L-82-1

ALEJANDRO PEREZ

v.

LAREDO JUNIOR COLLEGE, *et al.*

[Filed Sep. 22, 1982]

ORDER REJECTING MAGISTRATE'S MEMORANDUM AND RECOMMENDATION AND GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is a civil action filed pursuant to 42 U.S.C. §§ 1981, 1983, and 1988, in which the Plaintiff alleges that the Defendants violated the rights guaranteed him under the First, Fifth, and Fourteenth Amendments to the United States Constitution. The Plaintiff claims that the Defendants have deprived him of additional compensation which the Plaintiff claims to be entitled to receive as a holder of a Doctor of Philosophy degree. The Defendants have moved for summary judgment on the ground that the Plaintiff's claim is barred by the applicable two-year statute of limitations period. The Magistrate has recommended that the Defendants' Motion for Summary Judgment be denied. The Court, however, has reviewed all of the memoranda and facts before it, as well as the arguments of counsel, and finds that the Magistrate's proposed Findings of Fact 4, 5, and 6, as well as his Conclusions of Law and Recommendation should be, and are hereby, rejected. The Court further finds that since the Magistrate's proposed Findings of

Fact 1, 2, and 3 are not contested by the parties to this case, said Findings of Fact 1, 2, and 3 are correct and should be, and are hereby, adopted.

The Findings of Fact adopted by the Court are as follows:

1. Plaintiff is presently employed by Defendants;
2. Defendants rejected Plaintiff's claim for additional compensation and so informed Plaintiff on May 2, 1978; and
3. Plaintiff filed suit on January 6, 1982.

In addition to these Findings of Fact, the Court finds that the Plaintiff's complaint is based upon an allegation of a single violation of his civil rights, i.e., the failure to increase his compensation after he became the holder of a Doctor of Philosophy degree, rather than upon a continuing violation of his civil rights.

Since it is undisputed that the Plaintiff was informed on May 2, 1978, of the Defendants' rejection of Plaintiff's claim for additional compensation, the Court concludes that the Plaintiff's cause of action, if any, for violation of his civil rights accrued on that date. Furthermore, since the Plaintiff has failed to allege a continuing violation of his civil rights, the Court concludes that the instant case is barred by the applicable two-year statute of limitations. *Gonzales v. Firestone Tire and Rubber Company*, 610 F.2d 241 (5th Cir. 1980); *Page v. U.S. Industries, Inc.*, 556 F.2d 346, *re'h. den.*, 559 F.2d 1217, *cert. den.*, 434 U.S. 1045, 98 S. Ct. 890, 54 L.Ed.2d 796 (5th Cir. 1977); TEX. REV. CIV. STAT. ANN. art. 5526 (Vernon Supp. 1982). The Court further concludes that the fact that the Plaintiff continued in the Defendant's employ after he was denied his claim for additional compensation is insufficient to prolong the life of his alleged cause of action for civil rights violations. *Delaware State College v. Ricks*, 101 S. Ct. 498,

504 (1980); *United Air Lines v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 1889, 52 L.Ed.2d 571 (1977). The cases relied upon by the Plaintiff concern violations of Title VII of the Civil Rights Act of 1974, 42 U.S.C. § 2000e-5, and are not controlling in this case brought under the provisions of 42 U.S.C. §§ 1981, *et seq.* *See Roberts v. North American Rockwell Corp.*, 650 F.2d 823 (6th Cir. 1981); *Clark v. Olinkraft, Inc.*, 556 F.2d 1219 (5th Cir. 1977).

It is therefore ORDERED that the Defendants' Motion for Summary Judgment filed in the above-entitled cause should be, and is hereby, granted.

ORDERED this 22 day of September, 1982.

/s/ H. W. Head, Jr.
HAYDEN W. HEAD, JR.
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2464

ALEJANDRO PEREZ,
Plaintiff-Appellant,

versus

LAREDO JUNIOR COLLEGE, *et al.*,
Defendants-Appellees.

Filed Jul. 29, 1983

Appeal from the United States District Court
for the Southern District of Texas

ON PETITIONS FOR REHEARING
(July 28, 1983)

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby denied.

ENTERED FOR THE COURT:

/s/ J. B. Rubin
United States Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 82-2464
Summary Calendar

D. C. Docket No. L-82-1

ALEJANDRO PEREZ,
Plaintiff-Appellant,

versus

LAREDO JUNIOR COLLEGE, *et al.*,
Defendants-Appellees.

Filed Aug. 11, 1983

Appeal from the United States District Court
for the Southern District of Texas

Before RUBIN, JOHNSON and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed as to all counts of the complaint except Court II, which is reversed and remanded to the said

District Court for further proceedings consistent with the opinion of this Court;

IT IS FURTHER ORDERED that each party bear its own costs on appeal in this Court.

June 10, 1983

Issued as Mandate: Aug. 8, 1983

IN THE DISTRICT COURT
OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

C.A. No. L-32-1

ALEJANDRO PEREZ

vs.

LAREDO JUNIOR COLLEGE, *et al.*

[Filed Oct. 25, 1982]

JUDGMENT

On September 22, 1982, the Defendants' Motion for Summary Judgment, and Objections to the Magistrate's Memorandum and Recommendation, in the above-entitled cause came on to be considered before this Court. Having considered the parties' pleadings, legal argument, as well as the Magistrate's Memorandum and Recommendation, the Court found that Plaintiff failed to allege a continuing violation of his civil rights and that the present civil rights action was barred by the statute of limitations. Accordingly, the Court entered its Order Rejecting the Magistrate's Memorandum and Recommendation and Granting Defendants' Motion for Summary Judgment.

The Court is of the opinion that, based on such findings, Judgment should be rendered in favor of defendant, and it is therefore adjudged that Plaintiff's Civil rights action, alleging claims arising under the First, Fifth and Fourteenth Amendments of the United States Constitution, and the Civil Rights Acts codified as 42 U.S.C. §§ 1982, 1983 and 1988, as indicated in Paragraph one (1) of Plaintiff's Original Complaint, shall be and is hereby dismissed.

On the basis thereof, the Court further finds that the court lacks pendent jurisdiction over Plaintiff's claims

arising under the common law and statutes of the State of Texas in that Plaintiff's federal claims, being barred by the statute of limitations, are no longer before this Court. It is therefore adjudged that Plaintiff's claims under state law, pertaining to contracts and expost facto laws, shall be and are hereby dismissed for lack of jurisdiction.

It is therefore adjudged that Plaintiff recover nothing by this suit against Defendants, and that costs of suit be taxed against Plaintiff.

Signed and entered on the 21st day of October, 1982.

/s/ H. W. Head, Jr.
HAYDEN W. HEAD, JR.
United States District Judge

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

1. The First Amendment, United States Constitution, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. The Fifth Amendment, United States Constitution, which provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. The Fourteenth Amendment, United States Constitution Equal Position and Due Process Clauses, Section 1 thereof, which provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

4. The statutes under which Respondent filed his civil rights action, although only the claims which Respondent brought under 42 U.S.C. Section 1981 was the subject of the reversal of dismissal for which review is now sought, were 42 U.S.C. Sections 1981, 1983, and 1988, which provide as follows:

1981. Equal rights under the law.

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

1988. Proceedings of civil rights; attorney's fees.

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this

Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Office - Supreme Court, U.S.
FILED
NOV 23 1983
ALEXANDER L. STEVAS,
CLERK

NO. 83-701

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LAREDO JUNIOR COLLEGE, et al.,

Petitioners,

vs.

ALEJANDRO PEREZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1983

No. 83-701

LAREDO JUNIOR COLLEGE, et al.,

Petitioners,

vs.

ALEJANDRO PEREZ,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petition should be denied. It is utterly without merit.

The Petitioner (hereafter, for clarity, "the College") proposes to present the question of whether the Fifth Circuit erred in reversing the trial court's granting of summary judgment on Respondent's (Dr. Perez's) second claim for relief.

In his second claim, Dr. Perez complained that other faculty members of the college, similarly situated, were being paid for doctoral degrees outside their teaching areas, while he was not. He alleged this to be a continuing denial of equal treatment actionable under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983.

The Fifth Circuit held that summary judgment was not appropriate because the College had merely denied the allegation, but not negated it by deposition or affidavit, and because the summary judgment evidence did not conclusively resolve the material issue of fact. Perez vs. Laredo Junior College, 706 F. 2d 731, 734 (5th Cir. 1983). The Fifth Circuit remanded to the trial court for resolution of the factual issue. 706 F. 2d at 735.

Whether or not a motion for summary judgment was providently granted does not

present an issue of significance to this Court, particularly where the matter has been returned to the trial court for appropriate consideration.

Nor does this procedural decision provide a base for the College's far reaching and unfocused discourse on the propriety of continuing violations after Delaware State College vs. Ricks, 449 U.S. 250 (1980). In Ricks, this Court recognized the manifold circumstances which can be presented in employment claims and stated: "The application of the general principles discussed herein necessarily must be made on a case-by-case basis." 449 U.S. at 258 n. 9.

With respect to the concept of continuing violation, this Court noted in Ricks that the employee in that case did not identify alleged discriminatory acts that continued within the applicable limitations period. 449 U.S. 257.

The Fifth Circuit considered the College's argument with respect to Ricks and concluded that Dr. Perez had specified allegedly discriminatory acts which on the basis of the summary judgment evidence could not be said not to have continued within the applicable period.

Nothing in the Fifth Circuit decision is inconsistent either with Ricks or with generally accepted application of the continuing violation principle.

Conclusion

The petition is so wanting in merit as to border on the frivolous. It must be denied.

Respectfully submitted,

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DTL/af
11/18/83

CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the United States Supreme Court, certify in compliance with Rule 28.3 that three copies of the foregoing brief were served on this 21st day of November, 1983, on the attorney of record for petitioner by placing them in the United States mail, postage prepaid, addressed to his last known mailing address, as follows:

Horace C. Hall III, Esquire
Hall & Sames
P.O. Box 207
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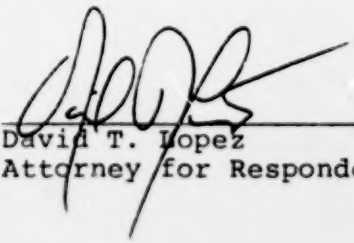

David T. Lopez
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